Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1163

HAROLD V. JOHNSON,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

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v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND REQUEST FOR SUMMARY REVERSAL

Harold V. Johnson, your Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, and the Petitioner further requests Summary Reversal.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported verbatim herein. (App. "A", pp. I and II.) The opinion of the State of Illinois Appellate Court, Fourth District, is reported verbatim herein. (App. "B", pp. I) The opinion of the Trial Judge, Circuit Judge John B. Wright, is reported verbatim herein. (App. "C", pp. I and II) Affidavits of State's Attorney, Edwin R. Parkinson, and First Retained Counsel, William S. Schildman, are reported verbatim herein. (App. "D" and "E", respectively.)

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on the first day of October, 1979. (Appendix "A", p. I.) The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C., Section 1257(3).

QUESTIONS PRESENTED

Whether the Petitioner's motion to withdraw plea of guilty and vacate judgment should be allowed?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment Six, Constitution of the United States.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1, Amendment Fourteen, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2, Article 1, Constitution of the State of Illinois, 1970:

> "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

STATEMENT

Defendant, a 56 year old married man with children, and with no prior record of conviction, was charged with the October 18, 1977 armed robbery of The First National Bank of Jacksonville, Illinois, and the aggravated assault of two police officers at the scene. The Defendant initially pleaded not guilty and requested a jury trial, but after plea negotiations through his retained counsel, he pleaded guilty to the armed robbery charge. The aggravated assault charge was dismissed and a negotiated sentence of four to twelve years imprisonment was imposed. Subsequently, Defendant filed a timely motion to withdraw his plea of guilty and to vacate the judgment, through a second retained counsel. The motion was denied and the Defendant appealed to the Appellate Court, Fourth District, State of Illinois. The Appellate Court confirmed the trial court's decision whereupon the Defendant filed a motion for re-hearing which was also denied by the Appellate Court. The Defendant then filed a petition for leave to appeal to the Supreme Court of Illinois which was also denied.

The Defendant, at a hearing on his motion to withdraw his plea of guilty, testified that his plea of guilty was not voluntary due to his attorney having represented to him and his wife that he, retained counsel, had overheard a conversation between the prosecutor and the trial judge to the effect that if a defendant were convicted after a jury trial, the judge had already decided to sentence him to thirty years to life imprisonment. The Defendant's wife and two friends and one of the Defendant's bosses all confirmed that shortly after retained counsel made these remarks, the Defendant was very upset and decided he must follow his attorney's advice and plead guilty; otherwise, thirty years added on

to his 55 year old age would mean that he would probably die in prison. Defendant's retained counsel was called as court's witness and counsel denied having made any statement to the Defendant and his wife. Defendant's counsel conceded that he may have said that the Defendant *could* get thirty years to life as opposed to *would* get thirty years to life.

Defendant also testified that he had consumed substantial amounts of intoxicating beverages and had several types of medication the day of his arrest. The medication was prescribed by his doctor for treatment of high blood pressure and related ailments.

Defendant's retained counsel also testified that intoxication or drugged condition was not an affirmative defense available to the Defendant due to armed robbery not being a specific intent crime.

The trial court denied the Defendant's motion to withdraw his plea of guilty and rendered its decision, Appendix C. The trial court stated in its memorandum of decision that it had reviewed the transcript of the guilty plea hearing, as well as the pleadings and the file and also *the discovery material including the report of Doctor Zilinskas.* There was no report of Doctor Zilinskas, a psychiatrist, in the records or filed with the court. The trial court went on to describe the contents of the report of Doctor Zilinskas. The trial court further stated that "Defendant's defense of intoxication did not hold up when his attorney's research indicated the defense did not apply since armed robbery was not a specific intent crime."

The People by one of its attorneys, prior to oral argument, before the Appellate Court, filed a Motion to File Supplemental Record Instanter for the purpose of includ-

ing in the record discovery materials of E. Zilinskas, a psychiatrist, and Donald Gottschalk, a psychologist, and that the Appellate Court allowed said motion. The affidavit accompanying said motion of the People included a statement by Edwin Parkinson, State's Attorney, which is attached hereto as Appendix "D", that the said reports were not a part of the record but that said reports were provided to the trial court. Defendant's attorney filed a motion to exclude state's attorney's and defendant's discovery materials from the record of appeal prior to oral arguments before the Appellate Court, but said motion was denied. Defendant's attorney next filed a Petition for Re-Hearing as well as an Amended Petition for Re-Hearing. The Amended Petition for Re-Hearing included an affidavit executed by Defendant's first retained counsel, which is attached hereto as Appendix "E", which confirmed that the reports of Doctors E. Zilinskas and Donald Gottschalk were delivered to the state's attorney's office as part of discovery but that said reports were not filed in the court file. Said first retained counsel did not recall delivering a copy of these reports to the court. The Appellate Court denied the Petition for Re-Hearing.

Further relevant facts are contained within the Petition as required and are not here repeated to avoid undue duplication.

The federal questions of constitutionality were raised on post-trial motions claiming the Defendant to have been deprived of effective assistance of counsel for his defense. The same question of constitutionality was presented to the Appellate Court and Supreme Court as well as the claim of denial of due process of law.

REASONS FOR GRANTING THE WRIT

I.

The Supreme and Appellate Courts of Illinois have decided federal questions of substance in conflict with the due process principles enunciated in these Courts. They have departed from the accepted and usual course of judicial proceedings, and their own rules relating to the consideration of extrinsic evidence not part of the trial record and usual course of judicial proceedings, and its sanction of such departure resulted in an erroneous judgment and miscarriage of justice, and deprived the Petitioner of his rights to due process of law.

The trial court inappropriately considered a report of E. Zilinskas, a psychiatrist, which was not a part of the record nor was it introduced into evidence at any stage of the proceedings.

At the conclusion of the hearing on Defendant's Motion to Withdraw Plea of Guilty, the trial court issued its decision as stated in Appendix C. The trial court specifically indicated that it considered the discovery material including the report of Doctor Zilinskas. The trial court went on to make findings of fact based on said report of Doctor Zilinskas, a psychiatrist.

The Defendant was not aware of the trial court's reliance on the report of Doctor Zilinskas until the decision was rendered. The Defendant was therefore deprived of explaining away or presenting other testimony and evidence concerning the negative aspects of the report. It is still unknown at this time as to how the trial court acquired the reports of Doctors Zilinskas and Donald Gottschalk.

In *People vs. Husar,* 22 Ill. App. 3d 758, the Appellate

Court held that it would not consider the extrinsic evidence since "The report of proceedings of the trial together with the clerk's mandatory record constitutes a complete record on appeal, not supplemental by affidavit."

The trial court had no authority to read or consider reports of psychiatrist or psychologist pursuant to the provisions of Chapter 38, §115-6, Ill. Rev. Stat., except when it is necessary to consider whether additional examinations of the Defendant are necessary, which it was not appropriate in this matter. Also under the provisions of Supreme Court Rule 415(c), "Any materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." If the state's attorney provided the trial court with a copy of the reports of the psychiatrist and psychologist, then he did so improperly. Likewise, it would be inappropriate for the defense attorney to provide copies of discovery materials to the judge except as part of the record.

Based on the facts in this matter, the Defendant had two primary theories of defense of which one was insanity. The trial court's consideration of a report of a psychiatrist not properly introduced into evidence or part of the record constituted extreme prejudice to the defendant's hearing on a motion to withdraw his plea of guilty. Due process was denied to the defendant.

II.

The Appellate Court inappropriately allowed People's motion to allow Defendant's discovery materials to be filed as a supplemental record on appeal over Appellant-Defendant's objection and even though the affidavit of Edwin R. Parkinson, State's Attorney, states on its face that the Defendant's discovery materials (Reports of E. Zilinskas, a psychiatrist and Donald Gottschalk, psychologist) were not a part of the record.

The Appellate Court, like the trial court, inappropriately considered the report of Doctors E. Zilinskas and Donald Gottschalk which were not a part of the trial court record. While the Appellate Court allowed the People's Motion to File Supplemental Record Instanter on or about March 15, 1979, it had no authority to add to the record of the trial court.

There have been numerous cases where the Defendant attempted to argue facts or matters of law not included in the record. Each time the Appellate Court or the Supreme Court has stated that reviews of appeals are limited to what appears of record. *People vs. Johnson,* 94 Ill. App. 2d 459, 237 N.E. 2d 545, (1968); *People vs. Jackson,* 28 Ill. 2d 37, 190 N.E. 2d 823; *People vs. Rogers,* 26 Ill. 2d 599, 188 N.E. 2d 22.

In the case of *People vs. Neukom,* 16 Ill. 2d 340, 158 N.E. 2d 340, 158 N.E. 2d 53, (1959), the Defendant alleged that the trial judge stated in his chambers that he knew the defendant and his co-defendant were guilty and he would see that "they got time". The court held "We cannot pass upon matters not appearing in the record before us". In this case the trial judge did consider matters not introduced into evidence but did acknowledge as part of the record by writing a decision, that he did consider certain reports. If the Appellate Court can not pass upon matters not appearing in the record, then it surely can not allow a trial judge to render a decision based upon testimony or evidence not properly before him.

The affidavit of State's Attorney Edwin R. Parkinson states on its face that reports of Doctors E. Zilinskas and Donald Gottschalk were not a part of the record. If the reports were a part of the record, then it would not have been necessary for the People to file a motion to add to the record on appeal. Likewise, the affidavit of Defendant's first retained counsel confirms that said reports were not made a part of the record.

The Appellate Court in its decision referred to the case of *People vs. Krantz,* (1974), 58 Ill. 2d 187, as justification for the trial court, and presumably the Appellate Court, considering discovery materials not part of the record. However, it appears that *People vs. Krantz* stands for the proposition that the entire record may be considered in determining whether or not there was an understanding by the accused of the nature of the charge. In the Krantz case as well as *People vs. Doyle,* 20 Ill. 2d 163, and *People vs. Harden,* 38 Ill. 2d 559, the entire record must be considered so that a defendant will not be allowed to take out of context isolated statements in the record.

The Appellate Court's misunderstanding of this point is extremely important inasmuch as one of the criteria which a trial court must consider in deciding whether or not a defendant should be allowed to withdraw his plea of guilty, is whether the defendant thought he had a viable defense. Again, the Defendant in this case was extremely prejudiced at his hearing on his motion to withdraw his plea of guilty inasmuch as he did not know or have reason to know that the trial court had knowledge of or considered a report of Doctors E. Zilinskas and Donald Gottschalk. Therefore, this error was not harmless error.

Due process was denied to the Defendant.

III.

The Defendant was denied effective assistance of counsel when the Defendant's attorney, William S. Schildman, was mistaken as to whether armed robbery was a specific intent crime and when Defendant's affirmative defense was his intoxication and/or drugged condition.

The Defendant's first retained counsel testified that he believed that armed robbery was not a specific intent crime to which voluntary intoxication or drugged condition is a defense. The trial court in its Memorandum of Decision repeated the opinion of the said first retained counsel and agreed with his opinion. However, at the time of defendant's arrest and trial and hearing on his motion to withdraw his plea of guilty, the Supreme Court has stated that armed robbery is a specific intent crime. *People vs. White* (1977), 67 Ill. 2d 107, 365 N.E. 2d 337. Even though *People vs. White* was overruled by *People vs. Banks* (75 Ill. 2d 392, 1979), the Supreme Court's interpretation of law at the time of the defendant's hearing is all important. Since the facts of this case overwhelmingly indicated that the defendant had committed an armed robbery, the defendant necessarily had only two defenses available to him. The first was the affirmative defense of insanity and the second was the affirmative defenses of voluntary intoxication and/or drugged condition. Defendant's retained counsel's unawareness of the law concerning one of the affirmative defenses was the most gross denial of ineffective assistance of counsel. While the Supreme Court has said from time to time that the Defendant is not entitled to a perfect trial, rather only a fair trial, it appears that counsel's mistake of law is anything but harmless error.

The point must also be made since the Supreme Court overruled *People vs. White,* there existed a great oppor-

tunity to try this case at a time when armed robbery was ruled to be a specific intent crime. Therefore, even if the Defendant were granted a new trial, he would be deprived from using voluntary intoxication and/or drugged condition as an affirmative defense.

The Appellate Court stated in its decision that a mistake of law especially where the law is unsettled does not constitute ineffective assistance of counsel. This opinion might have some validity if the mistake of law was of minor importance. In this case, that mistake weighted very heavily in causing the Defendant to enter into a negotiated plea agreement, and thereafter in the court's denial of Defendant's motion to withdraw his plea of guilty.

IV.

The trial court inappropriately considered armed robbery not to be a specific intent crime at the time it rendered its opinion on the Defendant's motion to withdraw his plea of guilty.

It is apparent from the record in the trial court's Memorandum of Decision that it was mistaken as to whether the law as to armed robbery being a specific intent crime. The trial court was obviously unaware of *People vs. White* at the time it rendered its decision. Thus the Defendant was not only deprived of effective counsel, but also of a fair hearing as a result of the trial court's mistake of law.

The Defendant was at an enormous disadvantage at the hearing on his motion to withdraw his plea of guilty when the judge ruled out the use of one of two affirmative defenses available to him.

Thus, the Defendant was denied due process.

V.

The Defendant's plea of guilty was not voluntary due to his attorney having erroneously advised him that armed robbery was not a specific intent crime.

The record clearly shows that Defendant's first retained counsel was mistaken as to the law concerning whether armed robbery was a specific intent crime. Inasmuch as Defendant's first retained counsel based his advice on his mistaken interpretation of law, the Defendant can not have said to have voluntarily entered a plea of guilty. Defendant's first retained counsel was misinformed and in turn misinformed the Defendant. The Defendant should not suffer the mistakes of his counsel. In any event, it can not be said that the Defendant's plea of guilty was voluntary under the circumstances.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari and Request for Summary Reversal should be granted.

Respectfully submitted,

G. RONALD KESINGER
110 North West Street
Jacksonville, Illinois 62650
Attorney for Petitioner

52261

APPENDIX A

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 1, 1979

Mr. G. Ronald Kesinger
Attorney at Law
110 North West Street
Jacksonville, IL 62650

No. 52261—People State of Illinois, respondent, vs. Harold V. Johnson, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX B

NO. 15264
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

Agenda No. 79-152

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
HAROLD V. JOHNSON,
Defendant-Appellant.

Appeal from Circuit Court Morgan County 77-CF-121

ORDER

Pursuant to the authority granted by Supreme Court Rule 23 (58 Ill. 2d R. 23), this court finds that an opinion would have no precedential value.

Defendant Harold V. Johnson was charged with the October 18, 1977, armed robbery of the First National Bank in Jacksonville, Illinois, and the aggravated assault of two of the police officers at the scene. Defendant initially pleaded not guilty and requested a jury trial, but after plea negotiations, he pleaded guilty to the armed robbery charge. The aggravated assault charge was dismissed and a negotiated sentence of 4 to 12 years' imprisonment was imposed. Subsequently, defendant filed a timely motion to withdraw plea and vacate judgment. The motion was denied and defendant appeals.

Defendant first contends that his plea of guilty was not made voluntarily. He alleges, as he did in his motion to withdraw plea, that he acted in response to representations by defense counsel that counsel had overheard a conversation between the prosecutor and trial judge to the

effect that if defendant were convicted after a jury trial, the judge had already decided to sentence him to 30 years to life imprisonment. Whether or not defense counsel made such a representation to defendant was a question of fact to be determined by the court on the basis of the record, the evidence presented at the hearing and the credibility of the witnesses.

Defendant's allegation was supported not only by his testimony and that of his wife, who was present at the time of defense counsel's alleged statement, but also by three friends of defendant who testified that defendant told them of his conversation with defense counsel soon after it was alleged to have occurred. On the other hand, the record shows that before accepting defendant's plea, the court asked him several times if any threats, force or promises other than those contained in the plea agreement had been used to obtain his plea, and each time defendant responded in the negative. At the hearing on his motion to withdraw plea, defendant contended that he answered in that manner because he had been told that the judge was "in on it," and he was afraid to answer otherwise. This contention was refuted to some extent by the fact that about 3 weeks after the plea and sentencing, defendant and his wife each wrote to the judge in question asking him for mercy and to give defendant another chance. In addition, both the prosecutor and the judge denied that the judge had ever made such a statement and defense counsel denied making such a representation to defendant.

Defense counsel testified that he did explain to defendant the possible minimum and maximum sentences for armed robbery and that a more severe sentence *could* be imposed after a jury trial, but he denied telling defendant that such a severe sentence *would* be imposed. The fact that counsel told defendant of the possibility of receiving a greater

sentence after trial than after a guilty plea is not in itself coercive. *People v. Thomas* (1972), 51 Ill. 2d 39, 280 N.E. 2d 433.

One factor which may be considered in testing the validity of a plea is the amount of evidence against the defendant. (*North Carolina v. Alford* (1970), 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160.) In the instant case, the evidence presented at the preliminary hearing and contained in the police reports was overwhelming that defendant had committed the armed robbery. Defendant was arrested by Jacksonville police as he left the bank with his pockets stuffed with money, wearing a ski mask and carrying a shotgun. He also had a .357 magnum revolver in his belt and a .25 caliber automatic pistol in his front pants pocket. At the preliminary hearing, one of the bank tellers testified that a man wearing a ski mask and carrying a shotgun entered the bank, announced that this was a holdup and then turned and shot the lens out of the surveillance camera directly above the entrance to the bank. The tellers placed their money up on the windows after the man told them to do so, and during this time, the teller triggered the silent alarm. While the man was putting the money in his pockets, they heard police sirens. The robber turned, looked around and then said, "That's all right, I'll get them too." He then put a little more money in his pockets, leaving a substantial amount behind, and left the bank. Shortly after that, the teller went outside and saw that the police had the man in custody. Unless defendant had some defense which would have negated the mental state necessary to commit armed robbery (which is unlikely as we discuss later), there is little doubt that he would have been convicted after trial.

We do not deem the court's finding that defendant's plea was voluntary to be erroneous.

Defendant next contends that he was denied effective assistance of counsel for a variety of reasons. First, he claims that defense counsel was unprepared for trial and therefore pushed defendant into pleading guilty rather than go to trial. Defendant points to counsel's failure to file disclosure to the People and to subpoena witnesses for trial and to alleged statements of defense counsel that he was not ready for trial and was going on vacation the weekend after trial was scheduled to start. The record shows that at the pretrial conference, defense counsel answered ready for trial. It was clearly within the court's sound discretion to believe defense counsel's testimony with regard to his readiness for trial and willingness to postpone his vacation had the case gone to trial. In addition, defense counsel, an experienced criminal defense attorney, adequately explained his failure to subpoena witnesses before the trial date. He thought jury selection would take several days due to the notoriety of the case, and did not know when he would need his witnesses. He also complied with the discovery order, at least in part, by tendering to the State reports of the psychologist and psychiatrist who examined defendant.

Defendant next contends that defense counsel did not adequately pursue a defense of insanity, was mistaken about the availability of voluntary intoxication as a defense, and was unaware of the defense of automatism. With respect to the insanity defense, the psychologist who examined defendant thought that he was paranoid and had had a "psychotic event" at the time of the robbery, but the psychiatrist who later examined defendant disagreed and gave his opinion that defendant had been sane. Defense counsel contacted other psychiatrists, but none were willing to testify at trial. It is questionable whether a psychologist would be qualified to testify as an expert on the issue of defendant's sanity. (*People v. Felton* (1975), 26

Ill. App. 3d 395, 325 N.E.2d 400.) Given the psychiatrist's report and the description of defendant's actions during the robbery, a successful insanity defense would have been highly unlikely.

Whether or not armed robbery is a specific intent crime to which voluntary intoxication is a defense is a question which has been subject to disagreement. At the time of defendant's arrest and trial, the question had recently been answered affirmatively (*People v. White* (1977), 67 Ill. 2d 107, 365 N.E.2d 337). Subsequently, that decision has been overruled (*People v. Banks* (No. 50584, January term 1979)). A mistake of law such as this, especially where the law is unsettled and of recent origin, does not constitute ineffective assistance of counsel.

Automatism, recently recognized as a defense in *People v. Grant* (1978), 71 Ill. 2d 551, 377 N.E.2d 4, is the state wherein a person is capable of action but lacks the volition to control or prevent his involuntary actions. The record contains no indication that defendant was in such a state at the time of the offense.

Finally, defendant argues that defense counsel suggested that defendant might receive special treatment or probation after sentencing, and that defense counsel did not adequately explain his right to a presentence report. Again, the court properly could have believed defense counsel's testimony that he told defendant that probation was not an available sentence for armed robbery, and that he did not suggest to defendant that he would speak to the court after sentencing about probation. There was nothing improper in his telling defendant that he would do what he could to have defendant placed in a minimum security facility. As to the presentence report, defense counsel testified that he discussed this with defendant and told him that it would be of little use because of the negotiated

sentence. A presentence report would not have had much use in the instant case where the court had agreed to the negotiated sentence which was the shortest minimum sentence which could have been imposed.

Defendant next contends that the trial judge should have recused himself *sua sponte* from deciding defendant's motion to vacate because the motion contained allegations of the court's involvement in the involuntary nature of defendant's plea. He argues that he may have borne a greater burden of showing his plea was coerced because the judge was naturally unreceptive to his claim and inclined to deny any allegations of impropriety. The record does not show any evidence of bias on the part of the trial judge. Furthermore, defendant has waived this issue by failing to file a motion for substitution of judges in the hearing on his motion to withdraw plea, and also by specifically requesting the judge to comment on the statements attributed to him. See *People v. Sangster* (1976), 43 Ill. App. 3d 937, 360 N.E.2d 783, and *People v. Jones* (1974), 24 Ill. App. 3d 1052, 322 N.E.2d 579.

Finally, defendant argues that the trial court erred in considering the report of a psychiatrist who examined defendant subsequent to the offense because that report was not introduced at the hearing on defendant's motion to withdraw plea. That report was part of the discovery material, and the court may consider the total record in

determining any issue concerning the correctness of plea proceedings. *People v. Krantz* (1974), 58 Ill. 2d 187, 317 N.E. 2d 559.

For the reasons stated, we affirm.

Affirmed.

Entered: May 11, 1979.

By Order of the Court consisting
of the panel of
Honorable Frederick S. Green
Honorable John T. Reardon
Honorable Richard Mills

APPENDIX C

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT
MORGAN COUNTY, ILLINOIS

PEOPLE, Plaintiff. vs. HAROLD V. JOHNSON, Defendant.	Order No. 77-CF-121

MEMORANDUM OF DECISION

The Court has considered the evidence in support of the motion to withdraw the plea of guilty, and has examined the authorities submitted. The Court has also reviewed the transcript of the guilty plea hearing, as well as the pleadings and the file; also, the discovery material including the report of Dr. Zilinskas.

It appears that defendant's own psychiatrist found him a normal character psychiatrically and that his actions were rational. The trial was to be on February 14, 1978. The file shows that the People indicated on February 9, 1978, that Dr. Zilinskas would be called by the prosecution as a State's witness.

The file also indicates the defense would be intoxication or insanity, rather than that defendant did not do it. The defendant never did and does not now deny doing the act. Defendant's defense of intoxication did not hold up when his attorney's research indicated the defense did not apply since armed robbery was not a specific intent crime. Defendant's only remaining defense crumbled at the last minute when insanity was ruled out by his own doctor, who was to be called by the prosecution.

The statement of facts indicates defendant's admission of guilt by way of confession to the police.

Based on all these assessments, defendant's attorney advised him he would try to negotiate a plea. This was done and defendant was advised in advance that the Court would concur. No promises of any kind were made which have been broken. The actions and advice of defendant's attorney were in the best interests of his client. The actions and advice complained of, viewed in the worst possible light, never did amount to a promise from defendant's attorney or the Court to the defendant that he *would* get a long-term unless he pleaded guilty, merely that he *could*, that that was a possibility. This was sound advice, which does not amount to coercion.

This was a plea in return for an agreed upon sentence. Defendant knew exactly what his sentence would be before he pleaded guilty. No other promises were made, let alone broken. He had time to consider the alternatives and even talked to friends about it, telling them that he intended to plead guilty. To say that the guilty plea was not voluntary is to say that it was coerced. I find no coercion in this case aside from the fact that defendant, if found guilty, might receive a sentence greater than the minimum. This is true in every case of a plea negotiated for the minimum sentence.

This is not such physical of psychological coercion as taints the plea. This led the defendant to make a rational choice based on the assessment of all factors by and advice

of competent counsel. His appearance and responses at the time of the plea of guilty were normal in every respect.

I find that defendant's guilty plea was voluntarily entered and, therefore, should not be withdrawn.

Motion to withdraw plea of guilty denied.

Filed, September 25, 1978.
Joe Casey
Clerk of Circuit Court
Morgan County, Illinois

Entered this 25th day of September, 1978.
cc: State's Attorney Parkinson
Attorney Kesinger
Attorney Schildman

/s/ John B. Wright
Judge

BJ

APPENDIX D

COUNTY OF MORGAN, STATE OF ILLINOIS

AFFIDAVIT

Your affiant, EDWIN R. PARKINSON, on oath states as follows:

1. That he is the duly elected State's Attorney of Morgan County and as such was the prosecuting attorney in the case of People vs. Harold V. Johnson, 77-CF-121.

2. That prior to trial, the defendant, through and by his attorney, William S. Schildman, asked for and received a continuance so that he could be examined by a psychiatrist to attempt to determine his mental state at the time of the alleged offense of Armed Robbery.

3. That the defendant chose Dr. E. Zilinskas and Donald Gottschalk, after which written reports of their findings were delivered to attorney for the defendant, Mr. Schildman.

5. That the defendant's attorney furnished the Court and the State with copies of the above-referenced reports prior to trial in compliance with discovery rules.

6. That although the above-referenced reports were not made a part of the record, the Court and the State were made aware of their contents at the instance of the defendant's attorney.

7. That the State felt that the mentioned reports were favorable to the State's position and therefor listed Dr. Zilinskas and Donald Gottschalk as State witnesses in the pre-Trial Discovery.

8. That all of the above matters occurred in advance of the defendant's decision to enter a plea of guilty to the offense of Armed Robbery in case No. 77-CF-121.

Dated at Jacksonville, Illinois this 21st day of February, 1979.

Subscribed and sworn to before me this
21st day of February, 1979.
/s/ Joyce Fairfield
Notary Public

/s/ Edwin R. Parkinson
Edwin R. Parkinson

APPENDIX E

STATE OF ILLINOIS }
COUNTY OF MORGAN } ss

AFFIDAVIT

Your affiant, William S. Schildman, on oath states as follows:

1. That I am an attorney licensed to practice law in the State of Illinois with law offices at 303½ West State Street, Jacksonville, Illinois.

2. That I represented Harold V. Johnson in the case of People v. Harold V. Johnson, Morgan County Case No. 77-CF-121 up to and including a negotiated plea of guilty to the offense of Armed Robbery.

3. That I have read a copy of an Affidavit executed by Edwin R. Parkinson, State's Attorney of Morgan County on February 21, 1979 concerning my former client, Harold V. Johnson, above mentioned.

4. That the affidavit of the State's Attorney indicates that I delivered copies of psychological and psychiatric reports to the court. I do not recall delivering a copy of these reports to the court. I did deliver a copy of the report of Dr. Zilinskas and Donald Gottschalk to the State's Attorney's office, as a part of discovery. These reports were not filed in the court file by agreement between myself and the State's Attorney's office to avoid any possibility of

their contents being printed or broadcast by the local news media.

Dated at Jacksonville, Illinois this 31st day of May, 1979.

Subscribed and sworn to before me, a
Notary Public, this 31st day of May, 1979.

/s/ G. Ronald Kesinger
G. Ronald Kesinger,
Notary Public

/s/ William S. Schildman
William S. Schildman